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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY JACOBSON,

Defendant and Appellant.

D076440

(Super. Ct. No. SCD281247)

APPEAL from a judgment of the Superior Court of San Diego County, Paula S. Rosenstein, Judge. Affirmed.

Alex Kreit, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Anthony Jacobson entered Daniel Barbour's house while Barbour was home. Upon encountering Jacobson, Barbour asked him to leave—and Jacobson complied. At his trial for burglary, Jacobson

admitted to the basic facts but disputed that he entered the residence with the intent to take any property.

In response to a defense motion in limine, the trial court ruled there should be no reference to Jacobson's prior criminal record. Unfortunately, this direction was never communicated to one testifying officer, who unwittingly mentioned that Jacobson had a record and outstanding warrant at the time of his arrest. Although the trial court admonished the prosecutor and took other limited steps to address the issue, Jacobson now claims the trial court erred in failing to declare a mistrial. Finding no abuse of discretion, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On an April morning, Daniel Barbour was in the bathroom getting ready for work when he heard a banging sound. Coming out to investigate, he encountered a stranger dressed in black and standing in his kitchen. The man was clutching a Bose speaker, which was still blaring a podcast episode Barbour had been listening to. Shocked but cogent, Barbour asked the man to put his speaker down and leave. The man in black obliged, walking almost casually out the front door after he paused to restore the houseplants he had moved when he crawled through the kitchen window. He lingered outside, peering into a dog grooming van and then waiting on the corner by the house—almost as if he was expecting a ride.

Barbour called 911. He also called his landlord, Lamont Insko, who lived three houses down and came over right away. Insko trailed the man in black, who had wandered into an alley and then ducked into a neighbor's yard. Insko demanded to know what he was doing there, and the man responded by questioning Insko's right to follow him. The police arrived

shortly afterward and arrested the man after Barbour provided a positive identification.

Defendant Jacobson, the man in black, told the story a little differently. He was on his way to a job—doing some work for a beachside homeowner—during a rough patch where he was homeless for a couple of months. He fell asleep on the bus and woke up at the last stop when the driver told him he had to get off.

Jacobson wandered for a bit, trying to get his bearings, and then he heard something coming from a nearby house that made him uneasy: A voice that sounded “just like a 911 call” between “[a] cop and the woman [on] dispatch.” As someone who struggled with mental health issues, Jacobson often felt he was being followed by authority figures, and he was convinced this noise was a police scanner conversation about *him*. Jacobson went to investigate.

Climbing the stairs of Barbour’s house, he paused below the kitchen window where he could hear the noises. He smoked a cigarette as he considered his options and decided to go inside to turn the device off. The window was open, so his only barrier to entry was a screen. He removed it and climbed inside, moving plants that were in his way before he jumped down from the sink. Jacobson picked up the speaker but could not turn it off even after five minutes; he was still trying when Barbour came out and confronted him.

Jacobson put the speaker down and left at Barbour’s request, but was sidetracked outside by a dog grooming van that he thought looked suspiciously like a surveillance vehicle. After checking out the van, he walked down an alley and ducked into a neighboring yard, thinking he should get out of plain sight because he knew he had done something wrong

by entering Barbour's house. When he realized Insko was following him, his "suspicions were confirmed." The two men had a verbal confrontation before Jacobson was arrested.

At his trial for burglary (Pen. Code § 459) and related allegations, Jacobson took the stand to offer his account. The only contested issue was his intent in entering Barbour's home. The prosecution argued intent could be inferred from all the surrounding circumstances, while Jacobson insisted he never planned to steal anything. In a moment Jacobson now highlights as irrevocably damaging to his credibility, information that had been barred by a motion in limine slipped into the trial; a testifying police officer inadvertently referenced running a records check on Jacobson and finding an outstanding warrant. The defense made a motion for mistrial, which was denied by the trial court. After some discussion with defense counsel, the court gave a curative jury instruction explaining that records checks are routinely conducted by law enforcement and should not be considered for any purpose as no records had come into evidence.<sup>1</sup> The jury convicted Jacobson as charged.

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<sup>1</sup> The instruction could have been more explicit as to the arrest warrant, but the omission was a strategic choice by defense counsel, who wanted to avoid calling the jury's attention to the warrant.

## DISCUSSION

Jacobson challenges the denial of his mistrial motion. He concedes the officer's remarks were brief and that a curative instruction was given, but argues the damage was done and that this is an "exceptional case [where] 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924; 935 (*Allen*); quoting *People v. Seiterle* (1963) 59 Cal.2d 703, 710.) In particular, Jacobson claims this was a close case that turned solely on the jury's assessment of his credibility—which was irreparably damaged by the officer's comments.

The trial court thought otherwise, and we review its decision for abuse of discretion. (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834; *People v. Williams* (1997) 16 Cal.4th 153, 211–212.) While it recognized the officer's reference was detrimental, the court believed it fell short of irretrievably prejudicing Jacobson and could be addressed by a curative instruction. Generally, we presume a jury is capable of following a curative instruction and actually did so. (*Allen, supra*, 77 Cal.App.3d at p. 934; *Navarrete, supra*, at p. 834.) The question before us, then, is whether the officer's testimony in this case created an insurmountable flaw to overcome that presumption.

Jacobson relies heavily on *Allen, supra*, 77 Cal.App.3d 924, to argue it did. *Allen* also hinged on credibility. The defendant was charged with robbery and he testified (along with his sisters) that he was elsewhere on the night in question. (*Id.* at p. 929.) The prosecution witnesses included a minor accomplice and his mother. The minor said Allen participated in the robbery, and his mother let slip that she heard from one of the defendant's sisters that the defendant was on parole. (*Ibid.*) The parole reference was immediately stricken and the jury was instructed to disregard it, but on

appeal Allen contended this revelation was incurable. The appellate court agreed and reversed his conviction, concluding it was “an extremely close case” and as such it was reasonably probable the outcome would have been different without the illicit parole reference. (*Id.* at p. 935.)

Jacobson argues his case is just like *Allen*, but we find it distinguishable in more than one way. There is a marked difference between a jury knowing a defendant was on parole and knowing a defendant was subject to an arrest warrant. Parole indicates that the defendant was *convicted* of a crime serious enough to result in a prison sentence and supervision after the fact. A warrant, in contrast, only indicates there was cause for the defendant’s arrest. While this distinction might not be apparent to all, a jury empaneled on a criminal case would, at a minimum, understand that an arrest warrant falls short of indicating a defendant was guilty of the charge.<sup>2</sup> Given this difference in degree, the reference to parole in *Allen* was far more damaging to the defendant’s credibility than the reference to an arrest warrant in this case.

The *Allen* court also determined that case was “extremely close.” (*Allen, supra*, 77 Cal.App.3d at p. 935.) Significantly, the trial judge here did not view Jacobson’s case the same way; she characterized the prosecution’s circumstantial evidence as “strong.” She also noted she did not find Jacobson particularly credible on the issue of intent and thought the jury could have reached the same conclusion. Jacobson points to his strange behavior and a jury note to argue otherwise, but we are unpersuaded. His odd behavior, while consistent with a mental health episode, does not preclude an intent to steal property. There are several reasons a jury might have doubted his

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<sup>2</sup> Pursuant to a standard instruction, the jury was told that defendant’s arrest was not to be considered as evidence of guilt.

account apart from the impermissible warrant reference, including his testimony that he spent a full five minutes inside the house just trying to turn off a speaker. As for the jury note, which asked if there was confirmation that Jacobson took a bus, we do not think it indicates a close case—especially since it took the jury just a few hours to reach its guilty verdict.

Here, in language approved by defense counsel, the jury was admonished to disregard the brief mention of Jacobson’s criminal history. We presume the jury followed that instruction, and concur in the trial court’s assessment that the inadvertent reference by the testifying officer was not so prejudicial as to require a mistrial. There was no abuse of discretion.

#### DISPOSITION

The trial court’s judgment is affirmed.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.